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AN ANALYSIS OF THE NOTION OF JURISTIC PERSONALITY

I.

The problem of the juristic (or the juridical or moral) personality undoubtedly belongs among the most difficult problems of legal science. It appears in every branch of that science (*e. g.*, in civil law, and especially in commercial law, in criminal, administrative, constitutional and international law); it was discussed by the Roman jurists and is still a matter of discussion in our times. Thus it is considered a problem of primary importance; but a problem it is indeed, since no general agreement regarding the nature of this "personality" has been reached so far.

The numerous theories concerning the notion of the juristic person can, perhaps, for the purpose of a general discussion, be reduced to three main ideas:

- I. Doctrine: The juristic person is a real entity;
- II. Doctrine: The juristic person is a juridical entity;
- III. Doctrine: The juristic person is not an entity at all, either real or juridical; it is a mere abbreviation of thoughts and words, a help to quick communication just as are many other terms.

I. The first doctrine is known also as the *organic* theory and was chiefly advocated by certain German authors. It maintains that even before and without legal regulations there exist real entities formed by a collectivity of men, such entities being like the individual naturally endowed with the quality of volition and action. Besides the natural organism (with its body and soul) there are *social* organisms having their own life and even a soul of their own. Some even speak of their "body." It appears that this somewhat naturalistic and materialistic doctrine has helped to introduce the generally acknowledged term "corporation" (from the Latin

“corpus”—body) and the widespread usage of the English word “body” meaning all kinds of human associations.

It is very difficult, if not impossible, to scrutinize this doctrine scientifically. It seems to be a question of belief. Whoever believes in the existence of real “soul” of a nation or of the will of a corporation (*e. g.*, the state) in the same way as he believes in the will-power of a human being, and who is not aware of the metaphorical usage of these words when applied to associations—he certainly will not find any difficulty in ascribing reality to a juristic person in the sense of the reality of “man” being a psycho-physical entity. But whoever holds (as we do) that a corporation, a municipality or a state is only a juridical unit which, it is true, has been created through identical aims, out of which however *one sole aim, one* so-called collective will, *one* soul can never evolve,—he can not adhere to the belief of the organic school.

II. The second doctrine may be called the fiction-theory; it is also known as the *Romanistic* doctrine. It holds that, by principle, only human beings can have legal qualifications; but it adds that, exceptionally, such qualifications can be extended to artificial, fictitious subjects; such subjects are the “juridical persons,” namely persons created for juridical purposes. Thus, this theory holds that “juridical” or “juristic” persons, though being fictions and not natural entities, have a legal or juridical reality.

III. The third group of theories endeavors to demonstrate that “juristic persons” are neither natural nor juridical entities, for they have no real rights or duties, rights and duties being applicable only to human individuals and not to fictitious beings (even if the latter be construed for juridical purposes only). This doctrine has been worked out in modern times by the “normative school” and chiefly by its champion, Professor Kelsen. But it must be noted that, even in earlier times, great masters of juridical science looked with scepticism upon the reality of juristic persons.

Thus Ihering,¹ the great German jurist, said that the rights of the so-called juristic persons belong to real human beings only; that is in the case of a corporation, to all its members, and in the case of endowments to those persons for whom the fruition of the endowment is intended. Another noted German author, Brinz,² held that rights which do not belong to a human person belong to *nobody*, and that they are merely attached to a certain purpose. Stammler³ speaks of the legal capacity of an association as being merely a "method."

Two known French writers, Geny⁴ and Duguit,⁵ speak, the first with great scepticism, the second with open censure, about the usefulness of the notion "juristic person." And the greatest English legal philosopher of the nineteenth century, John Austin, says in his famous "Lectures on Jurisprudence":⁶ "At present I will merely remark that they are persons by a figment, and for the sake of brevity in discourse. All rights reside in, and all duties are incumbent upon, physical or natural persons. But by ascribing them to feigned persons, and not to the physical persons whom they in truth concern, we are frequently able to abridge our descriptions of them."

- II.

Let us now consider and analyze some kinds of juristic persons. Generally speaking, theory recognizes two main kinds of such persons both of which comprise a group of human beings and also a group of things (*e. g.*, funds in trust or objects endowed for public use): (1) Corporations; and (2) Institutions or foundations. This distinction is based upon the fact that, in the case of the corporation the individuals of the group in whose interest the common ad-

1 GEIST DES ROEMISCHEN RECHTS (1858), part II, section II, pp. 393, 394.

2 LEHRBUCH DER PANDEKTEN (2nd ed. 1888) section II, p. 469.

3 THEORIE DER RECHTSWISSENSCHAFT (1911) 332.

4 METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSTIF (1919) 137.

5 1 TRAITE DE DROIT CONSTITUTIONNEL (1921) 369, 370.

6 1 AUSTIN, LECTURES ON JURISPRUDENCE (4th ed. 1873) 364.

ministration is set up, participate in this administration either directly, *i. e.*, personally, or indirectly, *i. e.*, by means of chosen representatives (*e. g.*, in the case of a limited company); whereas in the case of an institution or foundation the individuals (beneficiaries) do not participate in the administration either directly or indirectly.

In order to illustrate the first species we shall now consider certain commercial or gainful associations or companies, some of which are and some of which are not, at least according to European legal doctrines, classified as corporations and thus as juristic persons. Why this different classification? Without entering into a detailed analysis of the various types of companies, we may, in anticipating the result of our inquiries, say this: Each type is characterized by a set of rules indicating the method of defining the rights and duties of the individual members. These rules are more or less complicated, but finally they lead always to the members or to the organs of the association and thus to human beings as the real bearers of rights and duties. Thus we have the saying "the company itself has rights and duties." This saying is employed when the way in which the rights of the individual have to be determined is long and complicated. It is simply an abbreviating formula to obviate the analysis of numerous and perhaps very complicated juridical relations amongst the people in the association, and between them and outsiders. For, it is often not important for the outsiders to know *who*, within the group associated, will perform a certain action, for instance pay a certain sum and how the debt will be *finally* distributed amongst the members who are, anyhow, the *real payers* as far as their liability goes. The creditors are only interested in getting the sum due in a legally valid way. And, vice versa, it is of no interest to the debtors of the company how the sum they paid will be finally distributed amongst the members of the company who are the *real creditors*. The sum is simply paid, as we say, to the "company" and it is left with the organization

of the company how to have the sum given to the real creditors, *i. e.*, the individual members, according to the rules of the company. It does not alter matters at all even if the sum paid happens in the way just mentioned to be reduced or even cancelled on account of debts of the company; for the result of all these operations appears in the "dividend" or in the lack of it. But we must realize, in addition, that when we speak of any act whatsoever as being performed *by the company*, we are using a mere metaphor since all such acts are executed by definite persons who are appointed, empowered and endowed with rights and duties according to the law or the by-law (statute) of the organization and who are called organs. Thus we can always penetrate through all the juridical net-work to real human beings as bearers of rights and duties.

Now when this net-work of rules, as we call the legal organization of the group, is simple—such as is the case with the "societas" of Roman Law—then the rights and duties of the members can be easily perceived, and accordingly they themselves are usually considered the bearers of rights and duties and not the group; and so the group is not considered a "juristic person." But when the net-work of rules ruling a company is so complicated and dense that the rights and duties of its members can be discovered only after a protracted analysis, then we are accustomed to speak of this group as a special juristic person. Thus the organization, *i. e.*, the network of rules, is personified; and now we can better understand *Austin's* remark that these "persons" are feigned "for the sake of brevity in discourse" and that, thus, we are "able to abridge our descriptions of them."

We can observe, however, that the capacity and also the will, to penetrate through the net of the juridical mechanism right to the real subjects, is not the same with all people. A simple mechanism which he cannot or does not wish to analyze is often a sufficient reason for an average man to resort to personification; he does not distinguish between the

“societas” and the “corporatio” of Roman Law; he speaks of a “bank,” of a “hospital,” of a “railway,” of a “factory” as subjects of rights and duties, and does not bother whether these entities are a corporation or a society or a foundation or an institution. It is only the trained jurist who penetrates to the real subjects—men; the better he is trained the easier he will make this operation. But sometimes perhaps, though capable to do so, he has not the desire to analyze; *e. g.*, when he is not interested in who within the group will be *finally* charged with a duty or entitled to a right. The real legal subjects will in that case remain undefined for *him*, because *he* does not want to define them. The legislator also may sometimes take such a view in saying simply that an association has rights and duties, that it can sue or be sued,—leaving the business of defining the final subjects of rights and duties to the by-laws or statutes, which—and this must not be overlooked—are also part of objective law. But such a merely subjective attitude (subjective also in the case of the legal scientist and of the legislator) is not a basis solid enough for the construction of a notion which is supposed to have objective value. It seems that the muddled condition of the theory of the juristic personality is a consequence of subjective views.

III.

Yet there is a species of societies regulated by commercial codes to which juristic personality is acknowledged now almost unanimously. This is the “limited company”; its members participate in the enterprise by means of shares up to the amount of which they are liable for the debts of the enterprise. As a rule, these shares are freely transferable; consequently the real proprietors (owners) of the enterprise are very often unknown to the public and are unidentified. One does not know the shareholders and how many shares are held by each person. Therefore the French call such an association a “*société anonyme*.” It seems that, once the

shares have been paid, a new and independent proprietorship has come to existence which is administered by special organs and represented by them. Only rarely does it become apparent who the real proprietors are. Yet, this becomes evident precisely at two important moments: on the occasion of a general assembly of the members, *i. e.*, the shareholders, and on the occasion of the distribution of the dividend. At these rare moments the anonymity is interrupted and the real proprietors appear. They are definitely discernible by the possession and presentation of shares.

This example leads us to consider another kind of juridical relations under which the owner of propriety is in fact *purposely* and *permanently* undefined, because fruition or gain only is allowed to certain persons, whereas ownership is not intended to belong to anybody. The *temporary* anonymity, as characteristic of the limited company, turns in the case now under consideration into a *permanent legal* anonymity. Such is the case with the other and second big group of "juristic persons," called *foundations* and *institutions*. They are certain things (money or other goods) designated by a certain act (*e. g.*, donation or testament) for a certain purpose. Starting with the thesis that all property must be owned by a person the jurists endeavored to find that person. But they could not find any such human person. The property in question cannot be owned by the founder because it was just his will to part with this property. It is not owned by the beneficiaries for whom the fruition is intended; for such beneficiaries perhaps did not exist at the moment the foundation was established, and, they can, in any case, enjoy only the revenue of the property but they cannot dispose of the property itself. Nor are the administrators of the property its owners, for they have to administer the property for the purpose indicated by the founder and not for themselves. Therefore the jurists invented a fictitious "juristic" person who should own the property. For this purpose they personified either the property itself, or the "will" of

the founder, or even the organization, *i. e.*, the rules of the foundation. But the property cannot be owned by itself, the imagination of the "will" of the founder (who perhaps is already dead) as proprietor is rather a grotesque idea, but not less phantastic than the personification of the organization, *i. e.*, of a set of rules, as owner; it is by these very rules that a definite method of administration was set up which excludes any ownership, *i. e.*, power of *free* disposal.

We can avoid all these queer modes of construction if we part with the idea that every thing must be owned by a person. We can imagine without any difficulty things which are not owned by anybody but which are simply administered in a set way. This applies to the aforementioned cases.

We may also, it is true, imagine ownership itself merely as a kind of administration, but the very important fact is that the method of administration is not fixed in the case of ownership. This is the distinguishing characteristic of ownership that the owner can do with his property as he pleases; he can even destroy it. Though ownership has in modern times been limited in many cases, it still serves in most cases exclusively those interests which are determined by the owner himself; therefore he is held the subject of ownership. This property right is the prototype of any subjective right, the latter being defined as *power* or *domination*. The more this absolute right becomes limited, the more the owner turns into a mere administrator of the property for he can no longer deal with it as he wills, but only according to set rules which do not always serve his interests. And this right turns entirely into mere administration when the possessor is not allowed to use a thing he possesses for himself and as he likes, but when he is only entitled to administer it for others and as they determine. There are many intermediary situations between the absolute domination (*dominium*) which is essentially a pagan conception and the Christian idea which declines such domination and which has thoroughly subdued it in the magnificent idea of complete pover-

ty in the monastic life. It is important for the understanding of the law and its interpretation that two worlds of ideas are clashing in this contrast: one world (the Pagan) is based mainly upon the idea of domination, absolute ownership, subjective right; the other (the Christian) starting with the view that we are not in this world to dominate for ourselves, but to serve others even with the power vested in us, and always to serve God,—is unable thoroughly to accept ownership in the Roman sense; for it does not acknowledge subjective rights without subjective duties, and domination without service. As however the Christian ideal of complete detachment from worldly goods can be reached only by a few chosen souls, a certain egotistic sphere of absolute domination over things has been and probably will always be reserved, and with it the notion of complete private property and of subjective rights. But besides this egotistic inclination there exists the other, an altruistic one which, though not unknown in pre-Christian times, has, particularly under the influence of Christian ideas, brought forth precious fruit of charity and devotion. In this sphere in which there is no place for absolute domination and for property rights, institutions and foundations have found a fertile ground for growth and development.

Now, we are accustomed to speak of the property of the church, the state or the community, or of a foundation or institution. Though it does not serve the interests of *definite* persons who could dispose of it arbitrarily (which is an essential feature of property rights) we speak nevertheless of it as property, probably for the reason also that it is protected by the same legal means as the property of definite persons is protected. This protection is granted in order that nobody *outside* the institution in question may appropriate things labeled as its "property." But, *in addition to this*, it is protected by other legal means also which prohibit the persons *within* the institution, *i. e.*, its organs and also the bene-

ficiaries, from appropriating it to themselves.⁷ Thus, by all these means, the special *purpose* of the institution is protected; and this purpose is plainly indicated by the existence of a special administration which differs from the free exercise of property rights. The theory, it is true, has invented a new term "public property" for application in some such cases. But this term cannot be applied to institutions whose use is not determined for the public at large but only for a set of qualified persons as is the case with many foundations. And even when public use is intended, that means only usage, fruition and not property. The old Romans, with their beautiful logic, did not acknowledge any property rights concerning things which were "usui publico destinatae"; on the contrary; they declared those things to be "extra commercium" and they excluded by a formal act called "publicatio" any property rights to such things.

It is interesting to study how the notion of property was employed to explain the legal situations of institutions and foundations. In a statement made by a Dutchman, Schook,⁸ in the middle of the seventeenth century, regarding church property, it was said that the "dominium proprietatis" of it belongs to *nobody*, the "dominium absolutissimum" to *God*, the "dominium directivum" to the *state*, and the "dominium possessionis" or "servitutis" to the *clergy*. We can easily see that by this terminology he was explaining different spheres of the administration of one and the same thing. For if we leave aside the "dominium absolutissimum" of God (for God cannot be a subject in a juridical sense, since he cannot be subject to any system of rules) we find that the "dominium *proprietatis*" belongs to *nobody* at all, the "dominium directivum" of the state means the right of its supervision and the "dominium possessionis" of the clergy means administration and fruition by the clergy. Others ascribed the owner-

⁷ Conf. PITAMIC, A TREATISE ON THE STATE (1933) 40, 41.

⁸ Quoted in the brilliant treatise of Bernatzik, "Kritische Studien ueber den Begriff der juristischen Person." Archiv fuer oeffentliches Recht, vol. V., p. 294 (1890).

ship of church goods to the Pope or to the holder of the "beneficium," or to the collegium of the clergy, or to the parish or to the religious communion. This latter theory served in the time of the Reformation to justify the maintenance of property rights of the parish though its members had changed their belief. And the theory of the "dominium eminens" of state fostered the secularization of church goods. This is an example of the danger connected with construing property rights in cases where such rights are not compatible with the *purpose* of the institution.

The result of our reflection about the so-called juristic person is: The real bearers of rights and duties in the case of gainful societies (especially commercial companies) are its members; they can always be determined. This statement is clear and quite natural; for the association is established exclusively for the material benefit of its individual members. It is otherwise in the case of foundations and institutions. Here the administration is carried on for the benefit of an undetermined number of persons, many of them being unknown and unknowable because not yet existent; moreover all these persons are only beneficiaries of the fruition or of the usage of the institution, whereas there is no holder of the property itself who could have the right of free disposal; therefore no real property rights exist. Of course there are many intermediary and therefore mixed forms of the two types of "juristic persons."

So we come to the conclusion that in the essence of the law there are no fictitious persons; and thus the "juristic" or "moral" persons have rightly been called "artificial."

The fiction of a "juristic person" means in its most general sense that the general law does not wish in all cases to determine *all* conditions for individual rights and duties, but that it sometimes determines only the conditions for the creation of special rules, namely of by-laws or regulations, and then these by-laws alone determine finally the condi-

tions of individual rights and duties. This is a kind of delegated legislation, for the by-laws are still objective laws which, however, are essentially distinct from the general law by the fact that they are created by other than the general legislative organs; thus is constituted the autonomy or the self-government of corporations, institutions and foundations.

We do not propose to abolish the accustomed term "juristic person"; we only want to make clear and keep in mind that this notion is merely a means devised to abbreviate the extensive complexities of some juridical relations; but we ought never to allow a mere figure to make obscure to us the real character of those relations.

If one does not keep in mind this merely auxiliary function of the term "juristic person," if one ascribes reality to it, then a moral danger is likely to arise. For, once the "juristic person" is considered as an entity by itself, one is inclined to forget that human beings always stand behind this personification. In acting on behalf of, or against such an organization one sometimes believes himself to be dispensed from the laws of morality under the assumption that human interests are not, or not directly, involved. And so, not seldom, a lowering of the moral standard can be observed when acts of states, corporations, trusts, municipalities, etc., are at issue. The moral responsibility of the individual acting thus in the interest of these bodies might be slighter insofar as his personal interest is not involved. But nevertheless the general condition of the world suffers from this state of things. And a similar mentality is often exhibited by individuals when they are acting against such "juristic persons": to do harm to a corporation, a society or the state is not

considered so bad as to damage individuals. As if those "juristic persons" were something else than a mere expression to describe the mechanism of an association of human beings; and as if there were not behind this artificial bar (which in many cases certainly is a useful help for our thought) human beings who are the final gainers or losers, for it is beyond any doubt that "omne jus *hominum* causa"!

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